Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D2–28–345–1998
ABDUL AZIZ J
23 NOVEMBER 1998

Companies and Corporations *— Winding up — Stay of proceedings — Application for stay of hearing of winding-up petition by respondent company until the trial of a civil suit brought against petitioner company — Whether s 222 of the Companies Act 1965 empowers court to order stay of winding-up petition*

This was an application by the respondent company, relying on s 222 of the Companies Act 1965, to stay the hearing of the winding-up petition brought by the petitioner company. The fundamental issue that had to be decided by the court was whether s 222 empowers the court to order a stay of the present winding-up petition.

Held, dismissing the application with costs:
On the proper analysis of the manner in which s 222 is constructed, during the pendency of the winding-up petition in question, there is also pending an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding-up petition in question, although it may be some other winding-up petition. What may be applied for and ordered under the section is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question, which in this case is the present winding-up petition (see pp 168G–I and 169A–C).

[Bahasa Malaysia summary

Ini adalah permohonan oleh penentang, dengan merujuk kepada s 222 Akta Syarikat 1965, untuk penggantungan pembicaraan petisyen penggulungan yang dibawa terhadapnya oleh pempetisyen. Isu utama yang harus ditentukan oleh mahkamah adalah sama ada s 222 memberi kuasa kepada mahkamah untuk memerintahkan satu penggantungan terhadap petisyen penggulungan syarikat.

Diputuskan, menolak permohonan dengan kos:
Selepas menganalisa cara bagaimana s 222 ditafsir, semasa menunggu petisyen penggulungan tersebut, terdapat juga satu tindakan atau prosiding yang masih belum selesai terhadap syarikat yang hendak digulungkan itu. Tindakan atau prosiding yang masih belum selesai itu mestilah selain daripada petisyen penggulungan syarikat tersebut, walaupun ia boleh jadi satu petisyen penggulungan yang lain. Apa yang boleh dipohon dan diperintahkan di bawah seksyen ini ialah penggantungan prosiding-prosiding yang selanjutnya di dalam

tindakan atau prosiding yang masih juga belum selesai itu, dan bukannya prosiding selanjutnya petisyen penggulungan, di mana di dalam kes ini petisyen penggulungan tersebut (lihat ms 168G–I dan 169A–C).] A

Notes B

For cases on stay of winding up proceedings, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 899–906.

Cases referred to

Bryanston Finance Ltd v De Vries (No 2) [1976] 1 Ch 63; [1976] 1 All ER 25 (refd) C

Foursea Construction (M) Sdn Bhd [1998] 4 AMR 3508 (not folld)

Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 417 (not folld)

D

Legislation referred to

Companies Act 1965 ss 176(10), 222

Companies Act s 226 [UK]

Edwin Lim (*Johnston Yap* with him) (*Lim Kean Siew & Co*) for the petitioners. E

Jagjit Singh (*A Onn* with him) (*NK Tan & Rahim*) for the respondents.

Abdul Aziz J: The respondent company, against whom the present winding-up petition is brought, is seeking a stay of the hearing of the petition until the trial of a civil suit brought by the respondent company against the petitioner company. The respondent company relies on s 222 of the Companies Act 1965 ('the Act'). Learned counsel for the petitioner company has raised a preliminary question to be answered, namely, whether s 222 empowers the court to order a stay of the present winding-up petition. Authorities have been cited on both sides, but I think the question can be answered simply on a proper analysis of the manner in which s 222 is constructed. It says as follows: F G

> At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit. H

The making of an application under s 222, as represented by the words 'may ... apply', is to be done 'At any time after the presentation of a winding-up petition and before a winding-up order has been made' — that is to say, during the pendency of the winding-up petition in question, which in this case is the present winding-up petition. That is the time factor. The event I

A or case that gives rise to the need to apply is 'where any action or proceeding against the company is pending', the 'company' there being the company that is sought to be wound up, which in this case is the respondent company. That case or event must, of necessity, also be existing during the time factor, that is to say, during the pendency of the winding-up petition in question. Coupling the time factor with the case or event, we have a B situation where, during the pendency of the winding-up petition in question, there is pending — that is to say, by necessity of logic, also pending — an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding-up petition in question, although it may be some other C winding-up petition. Now, what may be applied for and ordered under s 222 is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question, which in this case is the present winding-up petition.

The result is as if the word 'other' had been added to the phrase 'action or proceeding' in s 222, but that word has not been included because, I D think, the intention of s 222 is so clear from the way it is constructed that it would have been unprofessional to attempt to enhance the clarity by adding the word.

The English s 226 was referred to in submission. It is as follows:

> At any time after the presentation of a winding-up petition, and before a E winding-up order has been made, the company, or any creditor or contributory, may —
>
> (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings there in; and
>
> F (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;
>
> and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

G It is to be noted that the event or case of an action or proceeding being pending against the company is, unlike in our s 222, provided in two paragraphs, (a) and (b), because the application is to be made in different courts, depending on whether the action or proceeding falls under para (a) or (b). Just as in our s 222, the action or proceeding under para (a) is not H qualified by the word 'other'. In para (b) however, is it so qualified, but not out of necessity to distinguish it from the winding-up petition in question but from the action or proceeding in para (a).

There is a note to the English s 226 at p 250 of *Companies, Law and Practice* by Magnus and Estrin (5th Ed) that says, 'When it is not established that a petition constitutes an abuse of the process of the court or that it I threatens a legal right of the company, it should not be stayed (*Bryanston Finance Ltd v De Vries (No 2)* [1976] 1 Ch 63, [1976] 1 All ER 25)'. Learned counsel for the respondent company cited that note as implying

that the petition in question itself may be stayed. I find, however, after glancing through *Bryanston Finance*'s case on which that note is based, that the case had nothing to do with the English s 226 and that the reference in the note to staying a petition should properly be a reference to restraining by injunction the presentation of a winding-up petition. That was one of the matters which the case was about.

In *Foursea Construction (M) Sdn Bhd* [1998] 4 AMR 3508, Rekhraj J at pp 3513 and 3514 held the view that where winding-up proceedings have been initiated against a company, an application by the company under s 176(1) of the Act, which is about compromises and arrangements, must be made in the winding-up proceedings and a stay of the proceedings may be granted under s 222. I respectfully disagree, not only for the reasons that I have given but also because a stay in connection with a proposed compromise or arrangement under s 176 is to be granted by virtue of s 176(10) and not s 222. I note that in *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 417, Rekhraj J again held that the winding-up petition in question may be restrained under s 222.

I conclude by saying that s 222 does not empower the court to stay the present winding-up petition. I dismiss the respondent company's application with costs.

Application dismissed with costs.

Reported by Mohd Rizal Abidin